STATUTES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1412

JOHN SCHILB, et al.,

Plaintiffs-Appellants,

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

On appeal from the Supreme Court of the State of Illinois

MOTION TO DISMISS

Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County, Illinois, and Maurice F. Joseph, as County Treasurer of St. Clair County, and the County of St. Clair, by their and its attorney, Robert H. Rice, State's Attorney of St. Clair County, move the Court to dismiss the appeal on the grounds that it does not present a substantial federal question.

The facts surrounding this appeal are correctly set forth in the Jurisdictional Statement under the heading "Statement of the Case." The judgment and opinion of the Supreme Court of the State of Illinois from which appeal is taken and the State statutes involved are correctly set forth in Appendix "A" and "D" to the Jurisdictional Statement.

I.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE COST PROVISIONS OF ILLINOIS' STATUTORY SCHEME PROVIDING FOR PRE-TRIAL RELEASE OF CRIMINAL DEFENDANTS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

As the facts stated in the Illinois Supreme Court opinion make clear (46 Ill. 2d 538, 540), this case does not involve criminal defendants who cannot obtain pretrial freedom because of their indigence. Rather, the named appellant and all members of the asserted class obtained pretrial freedom by posting 10% of the bail set in their cases. This liberal method of making bail is permitted under Illinois law under Section 110-7 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 110-7). The appellants real complaint is with the bail cost provision found in Section 110-7(f) of the Code (Ill. Rev. Stat. 1969, ch. 38, par. 110-7[f]).

The Illinois Supreme Court accurately outlined appellants' equal protection claim as follows:

> "Plaintiffs' first point is that Section 110-7(f) of the Code of Criminal Procedure is unconstitutional because it requires those seeking release under the provisions of Section 110-7 to pay bond costs, whereas those who use either section 110-2 (recognizance) or section 110-8 (deposit of full amount in cash or securities or pledge of real estate in double the amount) are not required to pay any costs whatever. In this connection plantiffs argue that all accused are *sui generis,* for each seeks pretrial release, and that to require payment of costs as a condition of pretrial freedom in the one case and not in the others consti-

> tutes an unconstitutional discrimination among the members of a homogenous class."
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> 46 Ill. 2d 538, 545

In support of this argument, appellants here rely primarily upon this Court's decision in *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966). Although not cited by appellants when this case was before the Illinois Supreme Court, and hence not discussed in either the majority or dissenting opinions filed by that Court, *Rinaldi* may be easily distinguished.

In *Rinaldi* this Court held a New Jersey statute unconstitutional which required only those indigents who were imprisoned after an unsuccessful appeal of their criminal convictions to reimburse the county for the costs of their trial transcript used on appeal. Since indigent parolees and convicted indigent defendants not imprisoned were not required to repay transcript costs, this Court could find no rational basis for singling out prisoners to pay such costs.

The factors giving rise to Illinois' bail reform legislation are far different and more complex than the considerations that prompted the enactment of the statute involved in *Rinaldi.* The legislative solution to the problem presented by the harshness of the methods for obtaining pretrial freedom in Illinois under prior law obviously called for a more sophisticated approach than that arrived at by New Jersey in *Rinaldi.* The Illinois Supreme Court's opinion states:

> "With respect to plaintiffs' position on unconstitutional classification it will be observed that it rests entirely upon the assumption that there is no basic or reasonable difference between those obtaining release under sections 110-2, 110-7 and 110-8. It is said that

all are accused of crime and seek release from pretrial custody and that the difference in their treatment relative to cost is a violation of fundamental concepts of equal protection and due process. In other words, the argument is that because the result of release is sought in each case there is but one class of persons who must be treated alike. However, though the end result may be release in all cases, whatever course may be followed, it must be apparent, we believe, that the means by which release is sought is entirely different in each of the sections of the statute in question. This is not only factually so but historically the legislative approach to the problems presented was to design the different sections of the statute to meet specific separate problems. (See Committee Comments, S.H.A., ch. 38, § 110-1 *et seq.* p. 298 *et seq.*) Thus section 110-2 providing for release on the accused's own recognizance was designed to meet a condition revealed by factual studies which proved that the great majority of persons released on bail have no intention of violating bail and will appear for trial. The studies further developed a second premise, that to the extent that pecuniary loss is a deterrent, such financial loss should be minimized in the case of the person who appears for trial. Section 110-7 (deposit of 10% of the amount fixed for bail with a return of 90% of the deposit on performance of conditions) was designed specifically to fulfill the needs shown by the second premise and curtail the activities of the professional bondsman. This section, by its wording, is obviously designed as the principal method to be used in giving bail. Section 110-8 provides for a method which may be used in "lieu of the bail deposit provided for in section 110-7" and, according to the comment, is designed primarily to meet the need of a method of posting relatively small amounts of cash bail in traffic cases and the like. It is stated in the above reference at p. 324: "It should always be kept in mind, however, that section 110-7 provides for

one type of procedure in posting bail, section 110-8 another."

It appears that the legislature did not consider itself as dealing with a single problem—*i.e.*, a provision of procedures for those entitled to bail generally. Instead it regarded situations possibly giving rise to separate needs and sought to accommodate those requirements. As to section 110-7, as already related, it sought to reduce the cost of bail and the high incidence of "bail gouging" by providing a method whereby any citizen accused of crime might have his liberty pending trial with a minimum of cost. On the other hand, it was careful to recognize and protect the rights of those who could and should be released upon their own recognizance within the limits of judicial discretion without any bond cost whatever. In none of the provisions in question is release conditioned upon the payment of bail costs in advance nor can payment of the one percent fee ultimately deducted under section 110-7(f) be considered a condition precedent to the selection of section 110-7 as the method of acquiring release."

46 Ill. 2d 538, 545-547

Thus, it may be said that in rearranging and softening the economic burdens of the pretrial release system, the Illinois legislature choose to impose minimal costs only in cases where the ciriminal offense was more serious and where the amount of bail set is proportionately higher, rather than to impose that burden upon those charged with relatively minor offenses.[1] This judgment cannot be said to be devoid of all rationality.

An adjunct to appellants' claim of a violation of equal protection is the assertion that the cost provision discrim-

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1. See Committee Comments, Ch. 38, Art. 110, Smith-Hurd Ill. Annot. Stats., pp. 145-149, 158, and 163-166.

inates in favor of the rich and against the poor criminal defendant. In regard to this contention, the Illinois Supreme Court stated:

> "Plaintiffs also contend that the cost retention provision of section 110-7(f) creates an unconstitutional disparity between the affluent and nonaffluent. It it said for a supposed example that accused "A" availing himself of section 110-8 deposits the full amount of bond and pays no cost, whereas accused "B", lacking sufficient property, obtains his release by depositing 10% of the full amount of bond under section 110-7 and is assessed a cost. It is argued that accused "B" is thus assessed a cost merely because his lack of affluence makes him unable to obtain his release by depositing the full amount under the provisions of section 110-8. Without stating any factual source, plaintiffs further state that "a considerable percentage of individuals, like accused 'B' have *no choice* but to seek release on their own recognizance under Section 110-2 or the 10% provision of Section 110-7" because they have neither cash nor real estate in sufficient amount to post the full amount of their bail. These are said to be "poor men" who should not be discriminated against due to their lack of wealth. Plaintiffs say that if the size of a deposit for bail is the distinguishing factor which rendered this group different from those who deposit the full amount of bail, there is an unconstitutional differentiation which is not cognizable in law and creates a disparity based on wealth. In support of their position plaintiffs cite a number of cases such as *Griffin* v. *Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, establishing the general proposition that the individual cannot be penalized in his quest for justice due to lack of wealth. Defendants concede the validity of this principle but deny that it is applicable under the facts presented here.
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> The difficulty with plaintiffs' position is that it is based primarily on the assumption that a majority

> or at least "a large percentage" of those seeking bail would prefer to elect to proceed under section 110-8 but lack the financial means to do so and are therefore forced against their wills to ask for bail under section 110-7 by posting the deposit. We find no support for this assumption in any of the stipulated facts. As we view the situation it is just as reasonable to assume that most of those eligible would elect to perfect bail under section 110-7 because of the convenience it affords and the very small cost of only one percent actually involved. Proceedings under section 110-8 necessarily involve tying up money and property for an indefinite period. In the case of a large bond the amount pledged would be in proportion and the consequent economic loss through deprivation of the opportunity to invest these funds could be considerable. It is reasonable to suppose, therefore, that even the relatively affluent would prefer to make bail under section 110-7. In any event we do not believe it can reasonably be said that choice between the means to be used is necessarily dictated by wealth or lack of wealth of the accused."
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> 46 Ill. 2d 538, 548-549

In addition, we may also state what is common knowledge, i.e., that non-affluence may cause hardships that the rich can often avoid. See, e.g., *Williams* v. *Shaffer,* 222 Ga. 334, 149 S.E. 2d 668, *cert. denied,* 385 U.S. 1037, 87 S. Ct. 772 (1967); *McDonald* v. *Board of Election,* 394 U.S. 802 (1969); *McInnis* v. *Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd,* 394 U.S. 322 (1969); *Bandy* v. *U.S.,* 82 S. Ct. 11 (1961); *Douglas* v. *California,* 372 U.S. 353 (1963) [Especially Mr. Justice Clark's dissenting opinion, wherein he describes this Court's practice in considering in *forma pauperis* applications. 372 U.S. 353, 359.] However, this fact standing alone does not render a statutory

scheme unconstitutional.[2] The fact that there may be some rich criminal defendants in Illinois who can always produce the full amount of very high bail in cash, or who are willing to remain in confinement until bail can be arranged under the more cumbersome methods provided, does not mean that Illinois is guilty of an "invidious discrimination" against poor criminal defendants. Finally, we reiterate that what is involved in this case is not a denial of pretrial freedom because of indigence, but an asserted right to pretrial release without cost. What was said in *McDonald* v. *Board of Election* is, therefore, appropos here:

> "* * * a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind', *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Ozan Lumber Co.* v. *Union National Bank*, 207 U.S. 251 (1907)."

394 U.S. 802, 809.

II.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE COST PROVISION OF ILLINOIS' STATUTORY SCHEME PROVIDING FOR PRETRIAL RELEASE OF CRIMINAL DEFENDANTS DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Appellants' Due Process claim is based upon the fact that the cost provision of Section 110-7(f) is imposed re-

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2. It should again be noted here that Illinois law permits pretrial release on the defendant's own recognizance. Section 110-2 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 110-2).

gardless of the outcome of the criminal prosecution. Relying on *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), appellants claim that the imposition of a cost for bail on an acquitted defendant violates the concept a fair procedure guaranteed by the Due Process Clause.

In disposing of this claim the Illinois Supreme Court observed:

> Finally, there is the contention that the cost provision of section 110-7(f) is illegal and void because it amounts to an assessment of court costs against a discharged defendant. Plaintiffs cite *Wells,* v. *McCullock,* 13 Ill. 606, and *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518, on this point. *Wells* involves an attempt to impose on an acquitted defendant court costs he has made in his defense. The court, relying largely upon the provisions of the statute relative to disposition of the question of costs in such cases, held that the defendant was not liable for their payment. In *Giaccio* the validity of a Pennsylvania statute authorizing the jury to impose the costs of a criminal prosecution on an acquitted defendant in a misdemeanor case was in question. The court held the statute unconstitutional on the ground of vagueness and the absence of any standards sufficient to enable a defendant to protect himself against arbitrary and discriminatory imposition of costs by a jury. But it did not say that the imposition of such costs would be unconstitutional in any event. However, whatever the rule might be as to the imposition of court costs on an acquitted or discharged defendant it has no application here. The payment of costs for prosecution is governed by an entirely different statute from that dealing with costs charged for the administration of bail bonds. The statute concerning the latter, as already observed, is section 110-7 of the Code of Criminal Procedure. Costs of prosecution in criminal cases are provided for in section 180-3 of the

Code of Criminal Procedure as follows. "When any person is convicted of an offense under any statute, or at common law, the court shall give judgment that the offender pay the costs of the prosecution." (Ill. Rev. Stat. 1969, ch. 38, par. 180-3.) This statute obviously refers only to court costs and has no reference to bond costs which are chargeable regardless of what subsequently occurs in the prosecution of the case and regardless of the guilt or innocence of the accused. It may be conceded that court costs sustained in his defense may not properly be assessed against an accused who has won his discharge or acquittal but that has no bearing whatever on bond costs and the retention of a percentage of such costs is not tantamount to the assessment of court costs against a discharged defendant. 46 Ill. 2d 538, 551-552.

III.

CONCLUSION

For all of the above reasons, we respectfully state that the Illinois Supreme Court correctly affirmed the dismissal of appellants' complaint, and that this appeal should be dismissed because it does not present a substantial federal question.

Respectfully submitted,

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